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# EXAMINING THE BOUNDARIES OF HATE CRIME LAW: DISABILITIES AND THE "DILEMMA OF DIFFERENCE"

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## INTRODUCTION

Although anyone is potentially a victim of crime, some groups are particularly susceptible to victimization because of their vulnerability, social marginality, or invisibility. Some criminals use a victim's minority group membership as a means of gauging the victim's level of guardianship and the degree to which society cares about what happens to the victim. They often expect—with good reason—that the criminal justice system will share the view that such victims are unworthy of vigorous enforcement of the law. The stereotypes and biases upon which these views are based are, in turn, residues of historical relations of subordination, inequality, and discrimination, which criminals capitalize upon and reinforce. Moreover, like the schoolyard bully who preys upon the small, the weak, and the outcast, crimes against the disadvantaged are increasingly understood to

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possess a distinct moral status and evoke particular policy implications.

For students of public policy, advocacy groups, and legislators alike, questions about how law can best respond to the criminal victimization of minorities and others who are systematically disadvantaged presents a pressing, yet familiar, problem. This problem is often stated as a question: should those interested in enhancing the status and welfare of minority groups pursue policies that provide "special" treatment for minorities; or, alternatively, should they pursue policies that ignore the unique social location, special qualities, and socially structured obstacles faced by minorities and work solely towards improving the social and legal resources available to all victims of crime, regardless of their social characteristics or group membership? Stated more succinctly, should all victims of crime be treated the same or should some victims of crime, namely people who face unique barriers when accessing the criminal justice system and pursuing justice, be distinguished and treated differently? Historically and in the current era, policymakers, especially lawmakers, and advocates for minorities have had to respond to this question. And, how they have responded and continue to respond to this question is consequential for the making of criminal law and the delivery of social justice in the United States. This article addresses this concern by examining the contours of and justifications for status provisions, especially "disabilities," in American hate crime law.

There are costs and benefits associated with both choices to policymaking. Policies that emphasize the "special" needs of minorities, such as affirmative action policies and anti-discrimination laws, can reinforce cultural distinctions between "minorities" and "normals."[1] Such policies can render minorities different from normals, underscore their "incapacities" and special needs as the defining feature of their identities and, ultimately, place them in subordinate positions within both the public and privates spheres of social life. Arguably, one of the unintended consequences of social policies that single out sub-

[1] Drawing from Erving Goffman's classic work, the word "normal" is not meant to imply moral judgment. Rather, it is used to reference societal norms and attendant judgments that have consequences for how individuals are classified and responded to by an array of social actors, including lawmakers and criminal justice officials. ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF A SPOILED IDENTITY 2-8 (1963).

populations for "special" protections and treatment is the reinforcement of the idea that people of color, women, gays and lesbians, the poor, immigrants, those with disabilities, and non-Christians, for example, are more vulnerable members of society, less capable of responding to real and perceived vulnerabilities, and ultimately less credible participants in an array of social activities, especially those interfacing with the criminal justice system.

In contrast, policies that ignore differences between types of victims risk being insensitive to the increasingly well-documented institutional, organizational, and interactional disadvantages faced by minorities, including those who find themselves confronting a criminal justice system with ideologies and structures that were enacted without them in mind.[2] Treating minorities the same as other crime victims does little to challenge the biases and stereotypes with which criminal justice officials often operate. A sizeable body of evidence suggests that ignoring social difference seldom is enough to produce equality, especially in the criminal justice system.[3] Indeed, as many advocates for people of color, Jews, women, gays, lesbians, and persons with disabilities have recently pointed out, crimes against minorities are often unrecognized or ignored by law enforcement.[4] Failing to acknowledge the differences around which systematic injustices revolve, the argument goes, allows state officials to continue to do business as usual and does little to remedy systematic inequality.

The choice between whether or not to emphasize and delineate social difference in social policy, especially law, has been astutely characterized by Harvard Law Professor Martha Minow as the "dilemma of difference."[5] As Minow details in her book *Making All the Difference: Inclusion, Exclusion, and American Law*, the dilemma of difference is a philosophical, legal, and strategic issue that has implications for an array of social issues ranging

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[2] *See generally* MICHAEL J. LYNCH & E. BRITT PATTERSON, RACE AND CRIMINAL JUSTICE *passim* (1991) (examining the ways race plays a role in the criminal justice system).

[3] Linda J. Krieger & Patricia J. Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE U.L. REV. 513, 513 (1983).

[4] Marlee Kline, *Race, Racism, and Feminist Legal Theory*, 12 HARV. WOMEN'S L.J. 115 (1989); Gary D. LaFree, *The Effect of Sexual Stratification by Race on Official Reactions to Rape*, 45 AM. SOC. REV. 842 (1980).

[5] MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 20-23 (1990).

from affirmative action to maternal leave policies to gay marriage to discrimination in the workplace against persons with disabilities.[6] As Minow writes:

> The stigma of difference may be recreated both by ignoring and by focusing on it. Decisions about education, employment, benefits, and other opportunities in society should not turn on an individual's ethnicity, disability, race, gender, religion, or membership in any other group about which some have deprecating or hostile attitudes. Yet refusing to acknowledge these differences may make them continue to matter in a world constructed with some groups, but not others, in mind. These problems of inequality can be exacerbated both by treating members of minority groups the same as members of the majority and by treating the two groups differently.[7]

Often summarized as a tension between "same" versus "different" treatment policies, the dilemma of difference is routinely confronted by advocates for minority constituencies, most notably those supporting or opposing the agendas of the contemporary civil rights movement to enhance the status and welfare of people of color, the modern women's movement to enhance the status and welfare of girls and women, the gay and lesbian movement to enhance the status of nonnormative sexualities, and the disabilities rights movement to enhance the status and welfare of persons with disabilities. Regardless of the vast differences among these groups, their constituencies, and the issues they confront, the value of considering the dilemma of difference is that it forces activists, policymakers, and members of the morally concerned citizenry to 1) anticipate the negative consequences of reforms based upon creating "special" treatment where such treatment directly or indirectly reproduces stereotypes about minorities and 2) acknowledge the drawbacks of ignoring the differences that define minorities of all sorts. Of course, being cognizant of the dilemma of difference does not necessarily ensure that it is resolved; rather, it only sensitizes advocates and policymakers to the costs associated with pursuing one kind of policy approach over another.

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[6] *Id.* at 20-23; *see* Alfredo J. Artiles, *The Dilemma of Difference: Enriching the Disproportionality Discourse with Theory and Context*, 32 J. SPECIAL EDUC. 1, 32-36 (1998); Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1 (1985); Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 325 (1984/85); Iris A. Young, *Feminist Moral, Social, and Legal Theory: Difference and Policy: Some Reflections in the Context of New Social Movements*, 535 U. CIN. L. REV. 535, 535 (1987).

[7] MINOW, *supra* note 5, at 20.

With the dilemma of difference in mind, this paper addresses a core question in the study of contemporary public policy in general and lawmaking in particular: when, how, and why should minority status be emphasized in public policy, especially criminal law? To address this broad question, we direct specific attention to the making of hate crime law in the United States, with a particular focus on the place and viability of "disabilities" within this body of law. First, we describe the history of state and federal hate crime lawmaking as a recent, innovative, and distinct policy response to age-old human behavior: violence motivated by bigotry and manifest as discrimination. Then, we argue that an empirical focus on the inclusion/exclusion of "disabilities" provisions in this body of law provides a useful, if not ideal, window through which we can examine a legal basis for including some status provisions (i.e., race, religion, ethnicity, sexual orientation, etc.) and not others (i.e., age, gender, marital status, class, occupation, etc.) in hate crime law. Once our analytic focus on disabilities is indicated, we discuss the parameters of "disabilities" provisions in hate crime law as a precursor to identifying a set of social and legal criteria for resolving the dilemma of difference relative to hate crime law.[8] Consistent with the original motivation for writing this paper,[9] this is the first article to systematically consider the legal basis and policy implications of treating crime victims with disabilities as victims and survivors of hate crime. This paper uses sociological data and research to consider the degree to which the deployment of hate crime law is a viable venue through which the status and welfare of minority groups—in particular persons with disabilities—can be enhanced.

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[8] Understanding the processes that result in the assignment of victim status to some individuals and groups, but not to others, is key to understanding the formation of criminal law. After all, once designated, victim status carries with it distinct understandings of the social relations that surround the individual, as well as his/her relationship to the larger social problem law is designed to address. Among other things, the label of victim underscores the individual's status as an injured person that is harmed by forces beyond his/her control; dramatizes the injured or harmed person's essential innocence; renders her/him worthy of others' concern and assistance; and often evokes calls for legal reform designed to address the attendant social problem. James Holstein & Gale Miller, *Rethinking Victimization: An Interactional Approach to Victimology*, 13 SYMBOLIC INTERACTION 103, 103 (1990).

[9] This work was commissioned by the National Research Council's Committee on Law and Justice and subsequently presented at the Workshop on Crime Victims with Developmental Disabilities at the National Academies of Science, Irvine, California.

## I. HATE CRIME LAW: AN INNOVATIVE RESPONSE TO "BIAS-VIOLENCE"

The *National Law Journal* recently noted that the 1990s may go down in history as "the decade of hate—or at least of hate crime."[10] Although it remains questionable whether the United States is actually experiencing greater levels of hate-motivated conduct than in the past,[11] it is beyond dispute that the ascendance of the concept of "hate crime" in policy discourse has focused attention on violence motivated by bigotry and manifest as discrimination in a new way. As we have argued elsewhere, what is now commonly understood as "bias" or "hate" crime is an age-old problem approached with a new conceptual lens and sense of urgency.[12] Despite a well-documented history of violence directed at minorities, during the 1980s and 1990s multiple social movements began to identify and address the problem of discriminatory violence directed at minorities: federal, state, and local governments instituted task forces and commissions to analyze the issue; legislative campaigns sprang up at every level of government; new sentencing rules and categories of criminal behavior were established in law; prosecutors and law enforcement developed special training policies and specialized enforcement units; scholarly commentary and social science research exploded on the topic; and the United States Supreme Court weighed in with its analysis of the laws in three highly controversial cases.[13] As a result of these activities, criminal conduct that was once undistinguished from ordinary crime has been parsed out, redefined, and condemned more harshly than before. And "hate crime" has secured a place in the American political and legal landscape.

These extraordinary developments attest to the growing concern with, visibility of, and public resources directed at violence motivated by bigotry, hatred, or bias. They reflect the increasing acceptance of the idea that criminal conduct is "different" when it involves an act of discrimination. More importantly, for the purposes of this article, it is clear that the law

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[10] David E. Rovella, *Attack on Hate Crimes is Enhanced*, NAT'L L.J., Aug. 29, 1994, at A1.

[11] JAMES JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW AND IDENTITY POLITICS § 4 (1998).

[12] VALERIE JENNESS & RYKEN GRATTET, MAKING HATE A CRIME: FROM SOCIAL MOVEMENT TO LAW ENFORCEMENT (2001).

[13] *Id.*

has become the primary institution charged with defining and curbing hate or bias-motivated violence. Legal reform has been one of—if not the most—dominant response to bias-motivated violence in the United States.[14] During a congressional debate on hate crime, Representative Mario Biaggi said it most succinctly when he argued, "the obvious point is that we are dealing with a national problem and we must look to our laws for remedies."[15] Concurring, Representative John Conyers, Jr. explained that the enactment of hate crime legislation "will carry to offenders, to victims, and to society at large an important message, that the Nation is committed to battling the violent manifestations of bigotry."[16] These views reflect a general agreement among state and federal legislators that "hate crimes, which can range from threats and vandalism to arson, assault and murder, are intended not just to harm the victim, but to send a message of intimidation to an entire community of people."[17]

With this solidified view of discriminatory violent conduct in hand, in the 1970s and early 1980s, lawmakers throughout the United States began to respond to what they perceived as an escalation of violence directed at minorities with a novel legal strategy: the criminalization of discriminatory violence, now commonly referred to as "hate crime." As result, by the turn of the century, "in seemingly no time at all, a 'hate crimes jurisprudence' had sprung up."[18]

### A. STATE HATE CRIME LAW

In the last two decades almost every state in the United States has adopted at least one hate crime statute that simultaneously recognizes, defines, and responds to discriminatory violence. Hate crime statutes have taken many forms throughout the United States, including statutes proscribing criminal penalties for civil rights violations; specific "ethnic intimidation" and "malicious harassment" statutes; and provisions in previously enacted statutes for enhanced penalties if an extant crime is

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[14] JACOBS & POTTER, *supra* note 11, at 29-44; JENNESS & GRATTET, *supra* note 12, at 3; FREDERICK LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW 4-7 (1999).

[15] 130 CONG. REC. 19844 (daily ed. July 22, 1985) (statement of Rep. Biaggi).

[16] 134 CONG. REC. 11393 (daily ed. May 18, 1988) (statement of Rep. Conyers).

[17] *Id.*

[18] Terry A. Maroney, *The Struggle Against Hate Crime: Movement at a Crossroads*, 73 N.Y.U. L. REV. 564, 567-68 (1998).

committed for bias or prejudicial reasons. These laws specify provisions for race, religion, color, ethnicity, ancestry, national origin, sexual orientation, gender, age, disability, creed, marital status, political affiliation, age, marital status, involvement in civil or human rights, and armed service personnel. In addition, a few states have adopted statutes that require authorities to collect data on hate (or bias) motivated crimes; mandate law enforcement training; prohibit the undertaking of paramilitary training; specify parental liability; and provide for victim compensation. Finally, many states have statutes that prohibit institutional vandalism and the desecration or the defacement of religious objects, the interference with or disturbance of religious worship, cross burning, the wearing of hoods or masks, the formation of secret societies, and the distribution of publications and advertisements designed to harass select groups of individuals. This last group of laws reflects a previous generation of what, in retrospect, could be termed "hate crime" law.[19]

Across the United States, state hate crime laws vary immensely in wording. Some laws employ a language of civil rights. For example, in 1987 California adopted an "Interference with Exercise of Civil Rights" statute that states:

> No person, whether or not acting under the color of law, shall by force or threat of force, willfully injure, intimidate, interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the constitution or laws of this state or by the Constitution or the laws of the United States because of the other person's race, color, religion, ancestry, national origin, or sexual orientation.[20]

In contrast, some states employ the language of "ethnic intimidation or malicious harassment." In 1983, for example, Idaho adopted a "Malicious Harassment" law that declares:

> It shall be unlawful for any person, maliciously and with the specific intent to intimidate or harass another person because of that person's

[19] These laws appeared as early as the late 1800s in response to perceived escalation of Klan activity. They are distinct from the contemporary hate crime laws insofar as they are considerably older, do not contain a bias "intent standard, do not specify "protected statuses, and most notably, were not introduced under the rubric of "hate crimes legislation." Richard Berk et al., *Thinking More Clearly about Hate-Motivated Crimes, in* HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN 126-31 (Gregory Herek & Kevin Berrill eds., 1992); Valerie Jenness & Ryken Grattet, *The Criminalization of Hate: A Comparison of Structural and Polity Influences on the Passage of 'Bias-Crime' Legislation in the U.S,* 39 SOC. PERSP. 129, 129 (1996).

[20] CAL. PENAL CODE § 422.6 (1987).

> race, color, religion, ancestry, or national origin to: (a) Cause physical injury to another person; or (b) Damage, destroy, or deface any real or personal property of another person; or (c) Threaten, by word or act, to do the acts prohibited if there is reasonable cause to believe that any of the acts described in subsections (a) and (b) of this section will occur. For purposes of this section, "deface" shall include, but not be limited to, cross-burnings, or the placing of any word or symbol commonly associated with racial, religious, or ethnic terrorism on the property of another person without his or her permission.[21]

Finally, some statutes simply increase the penalty for committing an enumerated crime if the defendant committed a criminal act that "evidences" or "demonstrates" prejudice or bigotry based on the victim's real or imagined membership in a legally recognized protected status. For example, in 1989 Montana adopted a "Sentence Enhancement" law that states:

> A person who has been found guilty of any offense, except malicious intimidation or harassment, that was committed because of the victim's race, creed, religion, color, national origin, or involvement in civil rights or human rights activities or that involved damage, destruction, or attempted destruction of a building regularly used for religious worship, in addition to the punishment provided for commission of the offense, may be sentenced to a term of imprisonment of not less than 2 years or more than 10 years, except as provided in 46-18-222.[22]

Despite variation in wording, these laws have criminalized select forms of bias-motivated violence.

### B. FEDERAL HATE CRIME LEGISLATION

Following the states' lead, the United States Congress has passed three laws specifically designed to address bias-motivated violence and it continues to consider additional legislation. In 1990, President Bush signed the Hate Crimes Statistics Act, which requires the Attorney General to collect statistical data on "crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity, including where appropriate the crimes of murder, non-negligent manslaughter; forcible rape; aggravated assault, simple assault, intimidation; arson; and destruction, damage or vandalism of property."[23] As a data collection law, the Hate Crimes Statistics Act merely requires the Attorney General to gather and make available to the public

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[21] IDAHO CODE § 18-7902 (1983).

[22] MONT. CODE ANN. § 45-5-222 (1989).

[23] Hate Crime Statistics Act of 1990, Pub. L. No. 101-275 (1990).

data on bias-motivated crime, which has been done every year since 1991 (see Table 1). It does not, in any way, stipulate new penalties for bias-motivated crimes, nor does it provide legal recourse for victims of bias-motivated crime. The rationale for the Hate Crimes Statistics Act was to mandate the collection of empirical data necessary to develop effective policy. Those supporting it argued that involving the police in identifying and counting hate crimes could help law enforcement officials measure trends, fashion effective responses, design prevention strategies, and develop sensitivity to the particular needs of victims of hate crimes.

In 1994, Congress passed two more hate crime laws. The Violence Against Women Act specifies that "all persons within the United States shall have the right to be free from crimes of violence motivated by gender."[24] The Violence Against Women Act allocated over $1.6 billion for education, rape crisis hotlines, training of justice personnel, victim services (especially shelters for victims of battery), and special units of police and prosecutors to deal with crimes against women. The heart of the legislation, Title III, provides a civil remedy for "gender crimes."[25]

In essence, Title III entitles victims to compensatory and punitive damages through the federal courts for a crime of violence if it is motivated, at least in part, by animus toward the victim's gender. This allowance implicitly acknowledges that some, if not most, violence against women is not gender-neutral; instead, it establishes the possibility that violence motivated by gender animus is a proper subject for civil rights action. In so doing, it defined the term "hate crime" as "a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to animus based on the victim's gender."[26] Although this law was recently ruled unconstitutional,[27] it was predicated upon and promoted the inclusion of gender in the concept of a hate crime.

Also in 1994, Congress passed the Hate Crimes Sentencing Enhancement Act. This law identifies eight predicate crimes—murder; nonnegligent manslaughter; forcible rape; aggravated assault; simple assault; intimidation; arson; and destruction,

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[24] Violence Against Women Act of 1994, Pub. L. No. 103-322 (1994).

[25] 42 U.S.C. § 13981(c) (1994).

[26] *Id.* at § 13981(d)(1).

[27] Brzonkala v. Morrison, 144 L. Ed. 2d 842 (1999).

**Table 1.**
**Bias-Motivated Offenses Reported by the Uniform Crime Reports, 1991-1998**

| *Type of Bias-Motivation* | *1991* | *1992* | *1993* | *1994* | *1995* | *1996* | *1997* | *1998* |
|---|---|---|---|---|---|---|---|---|
| **Race** | 2,963 | 5,050 | 5,085 | 4,387 | 6,170 | 6,767 | 5,898 | 5,360 |
| Anti-White | 888 | 1,664 | 1,600 | 1,253 | 1,511 | 1,384 | 1,267 | 989 |
| Anti-Black | 1,689 | 2,884 | 2,985 | 2,668 | 3,805 | 4,469 | 3,838 | 3,573 |
| Anti-American Indian/Alaskan Native | 11 | 31 | 36 | 26 | 59 | 69 | 44 | 66 |
| Anti-Asian/Pacific Islander | 287 | 275 | 274 | 267 | 484 | 527 | 437 | 359 |
| Anti-Multi-Racial Group | 88 | 198 | 190 | 173 | 311 | 318 | 312 | 373 |
| **Ethnicity/National Origin** | 450 | 841 | 701 | 745 | 1,022 | 1,163 | 1,083 | 919 |
| Anti-Hispanic | 242 | 498 | 414 | 407 | 680 | 710 | 636 | 595 |
| Anti-Other Ethnicity/ National | 208 | 343 | 287 | 338 | 342 | 453 | 447 | 324 |
| **Religion** | 917 | 1,240 | 1,245 | 1,232 | 1,414 | 1,500 | 1,483 | 1,475 |
| Anti-Jewish | 792 | 1,084 | 1,104 | 1,080 | 1,145 | 1,182 | 1,159 | 1,145 |
| Anti-Catholic | 23 | 18 | 31 | 17 | 35 | 37 | 32 | 62 |
| Anti-Protestant | 26 | 29 | 25 | 30 | 47 | 80 | 59 | 61 |
| Anti-Islamic | 10 | 17 | 13 | 16 | 39 | 33 | 31 | 22 |
| Anti-Other Religious Group | 5 | 77 | 58 | 72 | 122 | 139 | 173 | 138 |
| Anti-Multi-Religious Group | 11 | 14 | 11 | 14 | 25 | 27 | 26 | 45 |
| Anti-Atheism/Agnosticism/etc. | 4 | 1 | 3 | 3 | 1 | 2 | 3 | 2 |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| **Sexual Orientation** | 425 | 944 | 938 | 780 | 1,266 | 1,256 | 1,375 | 1,439 |
| Anti-Male Homosexual | – | – | 665 | 561 | 915 | 927 | 912 | 972 |
| Anti-Female Homosexual | – | – | 113 | 119 | 189 | 185 | 229 | 265 |
| Anti-Homosexual | 421 | 928 | 111 | 77 | 125 | 94 | 210 | 170 |
| Anti-Heterosexual | 3 | 13 | 28 | 16 | 19 | 38 | 14 | 13 |
| Anti-Bisexual | 1 | 3 | 1 | 7 | 18 | 12 | 10 | 19 |
| **Disability** | – | – | – | – | – | – | 12 | 27 |
| Anti-Physical | – | – | – | – | – | – | 9 | 14 |
| Anti-Mental | – | – | – | – | – | – | 3 | 13 |
| **Multiple Bias** | – | – | – | – | 23 | 20 | 10 | 15 |
| **TOTAL** | 4,755 | 8,075 | 7,969 | 7,144 | 9,895 | 10,706 | 9,861 | 9,235 |
| # of Participating Agencies | 2,771 | 6,181 | 6,551 | 7,356 | 9,584 | 11,354 | 11,211 | 10,461 |
| # of States, including D.C. | 32 | 42 | 47 | 44 | 46 | 50 | 49 | 46 |
| % of US Population Represented | n/a | 51 | 58 | 58 | 75 | 84 | 87 | 79 |

*Source: U.S. Department of Justice. U.S. Government. Washington, D.C.*

damage, or vandalism of property—for which judges are allowed to enhance penalties of "not less than three offense levels for offenses that the finder of fact at trial determines beyond a reasonable doubt are hate crimes."[28] For the purposes of this law, "hate crime" is defined as criminal conduct wherein "the defendant intentionally selected any victim or property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person."[29] Although broad in form, this law addresses only those hate crimes that take place on federal lands and properties.

Finally, the Hate Crimes Prevention Act was introduced in the Senate and House of Representatives. If signed into law, this legislation would

> [A]mend the Federal criminal code to set penalties for persons who, whether or not acting under the color of law, willfully cause bodily injury to any person or, through the use of fire, firearm, or explosive device, attempt to cause such injury, because of the actual or perceived: (1) race, color, religion, or national origin of any person; and (2) religion, gender, sexual orientation, or disability of any person, where in connection with the offense, the defendant or the victim travels in interstate or foreign commerce, uses a facility or instrumentality of interstate or foreign commerce, or engages in any activity affecting interstate or foreign commerce, or where the offense is in or affects interstate or foreign commerce.[30]

Although not yet law, this pending legislation broadens the reach of the Hate Crimes Sentencing Enhancement Act.

The state and federal laws described above show that many contemporary advocates share a commitment to using the law,[31] law enforcement,[32] and the criminal justice system[33] as vehicles

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[28] Hate Crime Sentence Enhancement Act of 1994, Pub. L. No. 103-322 (1994).

[29] *Id.*

[30] S. 622., 106th Cong., 1st Sess., (2000).

[31] *See* JACOBS & POTTER, *supra* note 11, at 29; JENNESS & GRATTET, *supra* note 12, at 3; Ryken Grattet et al., *The Homogenization and Differentiation of Hate Crime Law in the United States: Innovation and Diffusion in the Criminalization of Bigotry*, 63 AM. SOC. REV. 286, 286 (1998); Valerie Jenness, *Social Movement Growth, Domain Expansion, and Framing Processes: The Gay/Lesbian Movement and Violence Against Gays and Lesbians as a Social Problem*, 47 SOC. PROBS. 701, 701 (1995).

[32] JENNESS & GRATTET, *supra* note 12, at 127; BIAS CRIME: AMERICAN LAW ENFORCEMENT AND LEGAL RESPONSES *passim* (Robert J. Kelly ed., 1993); Susan Martin, *A Cross-Burning is Not Just an Arson: Police Social Construction of Hate in Baltimore County*, 33 CRIMINOLOGY 303 (1995).

to enhance the status and welfare of minority constituencies deemed differentially vulnerable to violence motivated by bigotry. Despite variation in their wording and content, criminal hate crime statutes are laws that criminalize, or further criminalize, activities motivated by bias toward individuals or groups because of their real or imagined characteristics. Drawing from Grattet, Jenness, and Curry,[34] this definition consists of three elements. First, the law provides a new state policy action, by either creating a new criminal category, altering an existing law, or enhancing penalties for select extant crimes when they are committed for bias reasons. Second, hate crime laws contain an intent standard. In other words, statutes contain wording that refers to the subjective intention of the perpetrator rather than relying solely on the basis of objective behavior. Finally, hate crime laws specify a list of protected social statuses, such as race, religion, ethnicity, sexual orientation, gender, disabilities, etc. These elements of the definition of hate crime law capture the spirit and essence of hate crime legislation designed to punish bias-motivated conduct.

The emergence and proliferation of hate crime law marks an important moment in the history of crime control efforts, the development of criminal and civil law, the allocation of civil rights, and the symbolic status of select minorities in the United States. As such, the emergence and proliferation of hate crime laws invites an examination of the place and prominence of status provisions—what Soule and Earle call "target groups"[35]—in hate crime law. This, in turn, sets the stage for an assessment of the bases upon which some status provisions are included in hate crime law, while others are not.

## II. "DISABILITIES" AS AN ANALYTIC FOCUS

Our review of hate crime law leads to two interrelated questions about hate crime law as a policy response to discriminatory violence and its relationship to select minority groups. First, to

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[33] PETER FENN & TAYLOR MCNEIL, THE RESPONSE OF THE CRIMINAL JUSTICE SYSTEM TO BIAS CRIME: AN EXPLORATORY REVIEW 7-8 (1987); Tanya Kateri Hernandez, *Bias Crimes: Unconscious Racism in the Prosecution of 'Racially-Motivated Violence'*, 99 YALE L. J. 832 (1990); JENNESS & GRATTET, *supra* note 12, at 127.

[34] Grattet et al., *supra* note 31, at 289.

[35] Sarah Soule & Jennifer Earl, *The Differential Protection of Minority Groups: The Inclusion of Sexual Orientation, Gender, and Disability in State Hate Crime Laws, 1976-1995*, 9 RES. IN POL. SOC. 3 (2001).

what degree have lawmakers recognized some minority populations, and not others, as potential and actual victims of bias-motivated conduct? Second, upon what basis *should* particular constituencies be considered for inclusion in hate crime law? To address these interrelated questions, we focus on the case of "mental and physical disabilities" as a status provision and "persons with disabilities" as a target population.[36] Although our focus on disabilities and persons with disabilities is primarily for analytic purposes, there are at least three good reasons for choosing this particular example.

First, persons with disabilities represent one of the largest minority groups in the United States. According to a 1997 Census Bureau report, about fifty-four million, or twenty percent, of Americans qualify as having some level of disability and half of those have a "severe" disability.[37] Moreover, literally anyone can become disabled at some point in their life; after all, some disabilities are ascribed and some are achieved. With regard to the latter, as the life expectancy for Americans increases, the population as a whole continues to age. And, as the population gets older and older, we can continue to expect more and more people to acquire debilitating conditions in ways that accompany the aging process itself.[38]

Second, recent research suggests that the multitude of ways that persons with disabilities are victimized is pronounced and, according to some, increasing.[39] In particular, there is growing agreement that the criminal justice system currently does not serve the needs of people with disabilities particularly well; thus, a variety of organizational and procedural reforms have been envisioned and proposed by various groups concerned about persons with disabilities and their relationship to crime, the criminal justice system, and the pursuit of justice.[40] The bulk of these proposals for reform have been itemized and articulated by the Office of Victims of Crime in a recently released bulletin

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[36] Anne Schneider & Helen Ingram, *Social Construction of Target Populations: Implications for Politics and Policy*, 87 (2) AMER. POL. SCI. REV. 334 (1993).

[37] JOHN MCNEIL, U.S. CENSUS BUREAU, AMERICANS WITH DISABILITIES, 1994-95, CURRENT POPULATION REPORTS 1 (1997).

[38] *Id.* at 2.

[39] CRIME VICTIMS WITH DEVELOPMENTAL DISABILITIES 10-20 (Joan Petersilia et al. eds., 2001) [hereinafter CRIME VICTIMS].

[40] *Id.* at 41-44.

on "Working with Victims of Crime with Disabilities."[41] Sponsored by the Department of Justice, this publication suggests an array of specific policy recommendations, including increasing the accessibility of the criminal justice system through everything from architectural changes to the introduction of communication technologies;[42] the creation of training measures for sensitizing law enforcement officials to the needs of persons with disabilities; fostering relations with disability service and advocacy organizations within the community; improving data collection efforts; and introducing specific protocols to assist the participation of persons with disabilities in the criminal process and to protect them from retaliation.[43] Finally, and perhaps most notably for the purposes of this article, a single recommendation put forth, almost in passing, by the Office of Victims of Crime indicates that hate crime law should be applied to crimes against persons with disabilities. To be exact, "prosecutors should invoke hate crime statutes, if indicated, when prosecuting crimes against people with disabilities. Judges should apply equal sentencing or sentencing enhancements, when allowed, for offenders who victimize people with disabilities."[44] Interestingly, from the point of view of the dilemma of difference, all of these proposals assume, in one way or another, that persons with disabilities are differentially subject to bias-motivated violence, have special needs, and face unique barriers when it comes to accessing the criminal justice system and pursuing justice if or when they are victims of violence.

Third, despite their numbers and an increasingly well-documented connection to violence, persons with disabilities have been largely overlooked by social scientists and sociolegal scholars interested in the nexus between violence, law and minority rights, as well as policymakers interested in responding to violence in particular and systematic inequalities more generally.[45] The vast majority of the sociolegal literature focusing on

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[41] CHERYL GUIDRY TYISKA, U.S. DEP'T OF JUSTICE, WORKING WITH VICTIMS OF CRIME WITH DISABILITIES *passim* (1998).

[42] Marka G. Hayes, *Individuals with Disabilities using the Internet: A Tool for Information and Communication*, 8 TECH. & DISABILITY 153 (1998).

[43] TYISKA, *supra* note 41, at 4.

[44] *Id.*

[45] CRIME VICTIMS, *supra* note 39, at 22-30; Lennard J. Davis, *Introduction* to THE DISABILITY STUDIES READER 1-5 (Lennard J. Davis ed., 1997); Barbara Faye Waxman, *Hatred: The Unacknowledged Dimensions in Violence Against Disabled People*, 9 SEXUALITY & DISABILITY 185-87 (1991).

the intersection of law and violence, and minority status or rights, focuses on race, religion, ethnicity, gender, and sexual orientation as the prime categories of civil rights law. In large part, this no doubt reflects the relative newness of "disabilities" as a recognizable axis of discrimination. The Americans with Disabilities Act of 1990[46] is relatively new compared to other notable civil rights laws, such as the Civil Rights Act of 1964.[47] Accordingly, and as we detail below, the term "disabilities" has had a less developed history in legal and public lexicon; moreover, the term "disabilities" in hate crime law is, at best, a second-class citizen insofar as it is peripheral to the core of hate crime legislation in the United States. Thus, it remains one of the most overlooked and occasionally negotiable status provisions in hate crime law.

Surprisingly, a critical discussion of the relationship between crimes against persons with disabilities and the parameters of hate crime law has yet to be developed. In particular, it is useful to first evaluate the place of "disabilities" in federal and state hate crime law, and then examine the bases for including "disabilities" alongside race, religion, ethnicity, gender, and sexual orientation in United States hate crime law. To do so creates a venue through which a social and legal justification for the formulation of hate crime law can be articulated and advanced.

## III. THE PLACE AND PROMINENCE OF "DISABILITIES" IN HATE CRIME LAW

The most direct way to assess the degree to which state lawmakers have recognized persons with disabilities as a constituency particularly vulnerable to violence and worthy of legal and social recognition as hate crime victims is to examine the "status provisions"[48] currently referenced in hate crime law. Accordingly, in this section we do so by first focusing on the distribution of status provisions in state hate crime law and then focusing on the place of "disabilities" in the evolution of federal hate crime law.

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[46] 42 U.S.C. § 121-01 (1990).

[47] 42 U.S.C. § 2000(e) (1964).

[48] Grattet et al., *supra* note 31, at 300-01.

A. THE STATUS OF "DISABILITIES" IN STATE HATE CRIME LAW

Figure 1 compares the status provisions included in hate crime laws in 1988 and 1998, ten and twenty years, respectively, after the first state hate crime law was passed. In 1988, the most common status provisions were for race, religion, color, and national origin. These provisions represented a legal response to the most visible, recognizable, and stereotypical kinds of discriminatory behavior:[49] bias-motivated violence directed at blacks, immigrants, and Jews. While other categories of discriminatory violence—like those organized around gender, ancestry, sexual orientation, creed, age, political affiliation, marital status, and disabilities—are sometimes recognized in the early period of lawmaking, they appear infrequently enough to cause one to conclude that they were not part of legislators' conceptions of the "normal" axes along which discriminatory violence routinely occurs.[50] Most notably, only five out of the nineteen states that had passed laws by 1988 included disability in those laws.

FIGURE 1

| | 1988 | 1998 |
|---|---|---|
| Anyone | 0.00% | 5.0% |
| Armed Services Personnel | 0.00% | 2.5% |
| Involvement in Civil or Human Rights | 0.00% | 2.5% |
| Marital Status | 5.26% | 2.5% |
| Age | 5.26% | 10.0% |
| Political Affiliation | 5.26% | 5.0% |
| Ethnicity | 0.00% | 12.5% |
| Creed | 15.79% | 15.0% |
| Disability | 26.32% | 50.0% |
| Sexual Orientation | 10.53% | 50.0% |
| Gender | 21.05% | 40.0% |
| Ancestry | 31.58% | 47.5% |
| National Origin | 100.00% | 87.5% |
| Color | 89.47% | 87.5% |
| Religion | 94.74% | 92.5% |
| Race | 100.00% | 95.0% |

[49] JACK LEVIN & JACK MCDEVITT, HATE CRIMES: THE RISING TIDE OF BIGOTRY AND BLOODSHED 21-31 (1993).

[50] *See* Grattet et al., *supra* note 31, at 300.

By 1999, however, a second tier of categories emerged and sexual orientation, gender, and disabilities became increasingly prominent in state hate crime law. Disability, in particular, rose from being included in about one-quarter of the states to one-half of the states. Currently, twenty-one states have laws covering disability, and that number continues to grow. While less stereotypical than their predecessors (i.e., race, religion, and national origin), sexual orientation, gender, and disability are categories that have become increasingly recognized as axes along which hate-motivated crime occurs.[51]

The respective unfolding of these clusters of statuses—the core and the second tier—reflects the history of various post-1960s civil rights movements in the United States.[52] Race, religion, color, and national origin reflect the early legal contestation of minorities' status and rights. Thus, there is a more developed history of invoking and then deploying the law to protect and enhance the status of blacks, Jews, and immigrants.[53] Because the gay and lesbian movement,[54] the women's movement,[55] and the disability movement[56] reflect a "second wave" of civil rights activism and "identity politics,"[57] sexual orientation, gender, and disability, respectively, have only recently been recognized by policymakers responsible for the formulation of hate crime law as legitimate axes around which hate crime occurs. Therefore, these statuses remain less embedded in hate crime law, resulting in gays and lesbians, women, and people with disabilities remaining less visible than other minority groups (e.g., blacks, Jews, and immigrants) and yet more visible than other groups (e.g., union members, the elderly, children, police officers, etc.).

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[51] VALERIE JENNESS & KENDALL BROAD, HATE CRIMES: NEW SOCIAL MOVEMENTS AND THE POLITICS OF VIOLENCE 42 (1997).

[52] ROBERT A. GOLDBERG, GRASSROOTS RESISTANCE: SOCIAL MOVEMENTS IN THE TWENTIETH CENTURY 141, 194, 223-25 (1991); JENNESS & BROAD, *supra* note 51, at 30.

[53] MINOW, *supra* note 5, at 9.

[54] *See* BARRY ADAM, THE RISE OF A GAY AND LESBIAN MOVEMENT 75-80 (1987); URVASHI VAID, VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY & LESBIAN LIBERATION 1-4 (1995).

[55] *See* MYRA MARX FERREE & BETH B. HESS, CONTROVERSY AND COALITION: THE NEW FEMINIST MOVEMENT 45-48 (1985).

[56] JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT *passim* (1993).

[57] GOLDBERG, *supra* note 52, at 220-23.

B. THE STATUS OF "DISABILITIES" IN FEDERAL HATE CRIME LAW

Consistent with the patterns revealed in the previous section, a review of the legislative histories of federal hate crime law reveals how the substantive character of federal hate crime law was shaped—at first by minorities' advocates and social movements and later by processes of institutionalization—such that those with disabilities were recognized as victims of hate crime only in the latter phases of federal lawmaking around the issue.[58] As Jenness documents, early advocacy work sponsored by an array of local, regional, and state level organizations comprising the Coalition on Hate Crimes[59] focused solely on the scope and consequences of race, religion, and ethnicity-based violence. Growing awareness of this type of violence became grounds for promoting federal hate crime legislation by a limited number of advocates, none of whom represented the interests of persons with disabilities. This advocacy successfully solidified a trio of statuses—"race, religion, and ethnicity"—as the anchoring provisions of all hate crime law. This solidification occurred without protest from federal legislators over the appropriateness of these provisions, which had already been legitimated by prior decades of civil rights organizing and changes in law.[60]

The character of hate crime law was reshaped when the domain of the law expanded to include additional provisions. Shortly after federal hate crime law was envisioned, gay and lesbian advocates developed and promoted proposals to further differentiate hate crime victims by adding "sexual orientation"

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[58] Valerie Jenness, *Managing Difference and Making Legislation: Social Movements and the Racialization, Sexualization, and Gendering of Federal Hate Crime Law in the U.S., 1985-1998*, 46 SOC. PROBS. 548, 566-67 (1999).

[59] The Coalition on Hate Crimes was comprised of civil rights, religious, ethnic, and law enforcement groups, as well as a diverse array of professional organizations, including: the Anti-Defamation League, the American Bar Association, thirty Attorneys General, the National Institute Against Prejudice and Violence, the National Gay and Lesbian Task Force, the American Psychological Association, the American Psychiatric Association, the Center for Democratic Renewal, the American Civil Liberties Union, the American Jewish Congress, People for the American Way, the National Organization of Black Law Enforcement Executives, the U.S. Civil Rights Commission, the Police Executives Research Forum, the Criminal Justice Statistics Administration, the International Association of Police Chiefs, the National Council of Churches, the National Coalition of American Nuns, and the American Arab Anti-Discrimination Committee.

[60] *See generally* Grattet et al., *supra* note 31, at 288; Jenness, *supra* note 58, at 42-43 (on the development of hate crime law in the U.S., with focus on its social, political, and legal precursors).

to the list of provisions in federal hate crime law.[61] Through direct and sustained testimony, gay and lesbian advocates were able to bestow empirical credibility[62] upon the violence connected with this provision (i.e., antigay violence). In addition, they successfully engaged in discursive tactics that rendered the meaning of sexual orientation more similar to (rather than dissimilar from) the meanings already attached to race, religion, and ethnicity. By successfully engaging in these linking strategies of persuasion, advocates representing gays and lesbians proved crucial to the expansion of hate crime law to cover sexual orientation, thereby ensuring that gays and lesbians are routinely recognized as victims of bias crime.[63]

In contrast, other status provisions initially recommended for inclusion in the law, but not added to the bill prior to its passage, did *not* attract significant, sustained advocacy and social movement mobilization in congressional hearings. For example, prior to the passage of the Hate Crimes Statistics Act, at least eight Senators argued: "we believe that the measure does not go far enough and include violence by and against union members."[64] Since hearings were not held on this type of bias-motivated violence (see Table 2), there was not a structural opportunity for representatives from unions to establish the empirical credibility of the problem and thus legitimate this provision; as a result, union affiliation was not adopted as a provision in federal hate crime law.

This same pattern applies to claims about children, the elderly, and police officers: all were status provisions proposed early in federal lawmaking but never adopted as core elements of federal hate crime law, in large part because none of these target groups had advocates lobbying Congress to include them

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[61] Jenness, *supra* note 58, at 42-43, 49-73.

[62] Claims are empirically credible "to the extent that there are events and occurrences that can be pointed to as documentary evidence." David A. Snow & Robert D. Benford, *Master Frames and Cycles of Protest, in* FRONTIERS IN SOCIAL MOVEMENT THEORY 140 (Aldon C. Morris & Carol McClurg Mueller eds., 1992). As Gamson notes, however, the term credibility "contains a subtle hedge." WILLIAM GAMSON, TALKING POLITICS 69 (1992). It is not that the claims have been proven true, but that they have the *appearance* of truth. In this case, advocates for gays and lesbians successfully made the case that violence against gays and lesbians was as epidemic and consequential as violence against people of color, immigrants, and Jews. Jenness, *supra* note 58, at 70.

[63] Jenness, *supra* note 31, *passim*.

[64] *Hate Crime Statistics Act, Hearings Before the Sen. Comm. on the Judiciary*, 101st Cong. 87 (1989).

**Table 2. Documents Comprising the Official Record for Federal Legislation Related to Hate Crime Law, 1985-1999 (Exluding Pending Legislation)**

| Bill/Law | Title | Document | Legislative Body/Audience/Outlet | Congress | Date | Pages |
|---|---|---|---|---|---|---|
| HCSA | Hate Crimes Statistics Act | Hearing | Subcommittee on Criminal Justice, House Judiciary Committee | 99th | 3/21/85 | 148 |
| HCSA | Crimes Against Religious Practices and Property | Hearing | Subcommittee on Criminal Justice, House Judiciary Committee | 99th | 5/16/85 | 52 |
| HCSA | Crimes Against Religious Practices and Property | Hearing | Subcommittee on Criminal Justice, House Judiciary Committee | 99th | 6/19/85 | 39 |
| HCSA | Hate Crimes Statistics Act | Report | Committee on the Judiciary | 99th | 7/18/85 | 4 |
| HCSA | Hate Crimes Statistics Act | Debate | Congressional Record | 99th | 7/22/85 | 7 |
| HCSA | Ethnically Motivated Violence Against Arab-Americans | Hearing | Subcommittee on Criminal Justice, House Judiciary Committee | 99th | 7/16/86 | 205 |
| HCSA | Anti-Gay Violence | Hearing | Subcommittee on Criminal Justice, House Judiciary Committee | 99th | 10/9/86 | 223 |
| HCSA | Anti-Asian Violence | Hearing | Subcommittee on Civil and Constitutional Rights, House Judiciary Committee | 100th | 11/10/87 | 459 |
| HCSA | Hate Crimes Statistics Act | Report | Committee on the Judiciary | 100th | 4/20/88 | 13 |
| HCSA | Racially Motivated Violence | Hearing | Subcommittee on Criminal Justice, House Judiciary Committee | 100th | 5/11/88 | 111 |
| HCSA | Hate Crimes Statistics Act | Debate | Congressional Record | 100th | 5/18/88 | 19 |
| HCSA | Hate Crimes Statistics Act | Hearing | Subcommittee on the Constitution, House Judiciary Committee | 100th | 6/21/88 | 287 |
| HCSA | Racially Motivated Violence | Hearing | Subcommittee on Criminal Justice, House Judiciary Committee | 100th | 7/12/88 | 73 |
| HCSA | Hate Crimes Statistics Act | Report | Committee on the Judiciary | 100th | 9/15/88 | 8 |
| HCSA | Hate Crimes Statistics Act | Report | Committee on the Judiciary | 101st | 5/1/89 | 13 |
| HCSA | Hate Crimes Statistics Act | Report | Committee on the Judiciary | 101st | 6/23/89 | 10 |
| HCSA | Hate Crimes Statistics Act | Debate | Congressional Record | 101st | 6/27/89 | 11 |
| HCSA | Hate Crimes Statistics Act | Debate | Congressional Record | 101st | 2/8/90 | 26 |
| HCSA | Hate Crimes Statistics Act | Debate | Congressional Record | 101st | 4/3/90 | 4 |
| HCSA | Hate Crimes Statistics Act | Debate | Congressional Record | 101st | 4/4/90 | 1 |
| VAWA | Women and Violence | Hearing | Committee on the Judiciary | 101st | 6/20/90 | 112 |
| VAWA | Women and Violence | Hearing | Committee on the Judiciary | 101st | 8/29/90 | 82 |
| VAWA | The Violence Against Women Act | Report | Committee on the Judiciary | 101st | 10/19/90 | 88 |
| VAWA | Women and Violence | Hearing | Committee on the Judiciary | 101st | 12/11/90 | 223 |
| VAWA | Violence Against Women: The Increase of Rape in America | Print | Committee on the Judiciary | 102nd | 3/21/91 | 37 |
| VAWA | Violence Against Women: Victims of the System | Hearing | Committee on the Judiciary | 102nd | 4/9/91 | 442 |
| VAWA | The Violence Against Women Act | Report | Committee on the Judiciary | 102nd | 10/29/91 | 111 |
| VAWA | The Violence Against Women Act | Hearing | Subcommittee on Crime and Criminal Justice, House Judiciary Committee | 102nd | 2/6/92 | 120 |
| HCSEA | Bias Crime | Hearing | Subcommittee on Crime and Criminal Justice, House Judiciary Committee | 102nd | 5/11/92 | 184 |
| HCSEA | Hate Crimes Sentencing Enhancement Act | Hearing | Subcommittee on Crime and Criminal Justice, House Judiciary Committee | 102nd | 7/29/92 | 214 |
| HCSA | Hate Crimes Statistics Act | Hearing | Subcommittee on the Constitution, House Judiciary Committee | 102nd | 8/5/92 | 139 |
| VAWA | Violence Against Women. A Week in the Life of America | Print | Committee on the Judiciary | 102nd | 10/1/92 | 38 |
| HCSEA | Hate Crimes Sentencing Enhancement Act | Report | Committee on the Judiciary | 102nd | 10/2/92 | 7 |
| VAWA | Violent Crimes Against Women | Hearing | Committee on the Judiciary | 103rd | 4/13/93 | 84 |
| VAWA | The Violence Against Women Act | Report | Committee on the Judiciary | 103rd | 9/10/93 | 111 |
| HCSEA | Hate Crimes Sentencing Enhancement Act | Report | Committee on the Judiciary | 103rd | 9/21/93 | 7 |

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|---|---|---|---|---|---|---|
| VAWA | Violence Against Women: Fighting the Fear | Hearing | Committee on the Judiciary | 103rd | 11/12/93 | 57 |
| VAWA | Crimes of Violence Motivated by Gender | Hearing | Subcommittee on Constitutional and Civil Rights, House Judiciary Committee | 103rd | 11/16/93 | 129 |
| VAWA | The Violence Against Women Act | Report | Committee on the Judiciary | 103rd | 11/20/93 | 66 |
| HCSA | Hate Crimes Statistics Act | Hearing | Subcommittee on the Constitution, House Judiciary Committee | 103rd | 6/28/94 | 58 |
| HCSA | Reauthorization of the Hate Crimes Statistics Act | Hearing | Committee on the Judiciary | 104th | 3/19/96 | 110 |
| HCSA | To Reauthorize the Hate Crimes Statistics Act | Report | Committee on the Judiciary | 104th | 5/13/96 | 6 |
| HCSA | Hate Crimes Statistics Act | Debate | Congressional Record | 104th | 6/21/96 | 2 |

| Total |
|---|
| 3 bills/laws |
| 6 Congresses |
| 22 Congressional Hearings |
| 12 Congressional Reports |
| 7 Congressional Debates |
| 2 Committee Prints |
| 4140 Pages of Documents |

Source: Jenness, Valerie. 1999. "Managing Differences and Making Legislation: Social Movements and the Racialization, Sexualization,

in federal lawmaking on hate crime. Representative John Conyers, Jr., the legislator primarily responsible for initiating and sustaining federal hearings on hate crime, conceded the importance of social movement organizations and other activist groups when he explained why, at least early on in federal lawmaking on hate crime, some statuses were included and others were not:

> The reason we did not include octogenarians who are assaulted is because there was no testimony that suggested that they ought to be, as awful as the crimes visited upon them are, and the reason we did not account for policemen killed in the line of duty, although police organizations do, is that there was no request that they be separated out from the uniform crime statistics.[65]

Senator Gekas, who opposed the inclusion of sexual orientation being based primarily on the presence and persuasive politics of gay and lesbian advocates, immediately responded to Representative Conyers:

> If the only criterion is to have the gay rights organization have its request acceded to by inclusion in that, I say to the Members that the gentleman should join with me now in a motion to recommit, to put this bill back into committee and allow the inclusion in this bill of statistics to be gathered on the incidence of child abuse, of attacks on the elderly, attacks on policemen, and attacks on other groups which might for one reason or another be victims of such type of crime.[66]

The reverse of this pattern, particular only to the later phase of lawmaking, is further evidenced by the history of the disabilities provision in federal hate crime law. Although "the Congress apparently did not think that disabled people compromised [sic] a 'high risk' group in relation to interpersonal violence"[67] when it first contemplated hate crime legislation, disability was later added to federal hate crime law via the *re*authorization of the Hate Crime Statistics Act, the original and final formulation of the Hate Crimes Sentencing Enhancement Act, and the current formulation of the Hate Crime Prevention Act. The changing character of federal hate crime law along these lines occurred despite the fact that federal lawmakers have never held a hearing on violence directed at those with disabilities *as a*

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[65] 134 CONG. REC. 11393 (daily ed. May 18, 1988) (statement of Rep. Conyers).

[66] 134 CONG. REC. 11403 (daily ed. May 18, 1988) (statement of Sen. Gekas).

[67] Waxman, *supra* note 45, at 186.

*type of hate crime* and no protest occurred over this provision (see Table 2). Moreover, the official records of federal level hate crime lawmaking reveal that representatives from the disability rights movement have yet to offer testimony related to federal hate crime legislation (see Table 2).[68] Nonetheless, later in the history of federal lawmaking on hate crime, the inclusion of disabilities in federal hate crime law occurred in light of the fact that disability—like race, religion, and gender—was already a standard subject of federal discrimination law. In large part, this occurred because of the earlier passage of the Americans with Disabilities Act in 1990,[69] which ensured that "disabilities" had a home in federal civil rights legislation.[70]

### C. "DISABILITIES" AS A SECOND-CLASS CITIZEN IN HATE CRIME LAW IN THE UNITED STATES

As the above examination of both the federal and state laws reveal, the provision for disabilities has found a home in hate crime legislation, but it remains somewhat in the basement of that home. First, after more than twenty years of lawmaking in response to bias-violence, only half the states have laws that cover disabilities (see Figure 1). And while all three of the federal laws now contain provisions for "disabilities," these provisions were only included as afterthoughts.

Second, both the federal and state efforts to collect data on bias crimes directed at people with disabilities have lagged behind efforts to collect data on the other types of bias crimes. For example, as mandated by the Hate Crime Statistics Act, the Federal Bureau of Investigation began to collect bias crime data as part of the Uniform Crime Report in 1990. However, consistent with the late arrival of "disabilities" as a status provision, the FBI only began to report figures for violence against persons with disabilities in 1997 (see Table 1). Even then, the FBI reported only thirteen cases of hate crimes directed against people with disabilities nationwide (see Table 1). Given the size of the disability population, it seems highly likely that there is a severe underreporting of the hate crimes committed against this class of people. Similarly, at the state level, reporting efforts have been delayed. For example, California—with more than

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[68] Jenness, *supra* note 58, at 554-55, 566.

[69] 42 U.S.C. § 12101 (1994).

[70] Jenness, *supra* note 58, at 567; JENNESS & GRATTET, *supra* note 12, at 71-72.

four and a half million people with disabilities (more than twenty percent of the population) and a fifty-two percent increase in the number of persons classified as having developmental disabilities between 1985 and 1986[71]—has only been publishing hate crime statistics since 1995. Specifically, from 1995-1998, California reported three or fewer cases of hate crimes directed at people with disabilities. Given the marginal status of disability in the laws and the fact that victims of such crimes are frequently unable to garner the full attention of the criminal justice system, it seems highly likely that this number is an underestimate.[72]

Third, police training publications and curriculum at federal, state, and local level tend to discuss disability-based hate crime only infrequently, if at all.[73] For example, in the definitive national bias-crime training manual for law enforcement and victim assistance professionals, none of the "bias crime indicators" and illustrative cases relate to victims who were selected because of their disabilities.[74] As a result, disability-based hate crime remains largely invisible to front-line law enforcers, who tend to focus mostly on race, religion, sexual orientation, and nationality. This incomplete focus, in turn, results in an underreporting of crimes motivated by someone's disability.

Fourth, there have been no appellate cases dealing with the disability provision. Most of the case law throughout the 1990s dealt with hate crimes based upon race, religion, and national origin—the triad of categories embedded earliest in the law. Later on, appellate courts considered sexual orientation and gender cases. The lack of disability-based hate crime cases may suggest that prosecutors were most concerned with applying the laws to "familiar" kinds of hate crime cases.[75] It may be harder for prosecutors to perceive crimes against persons with disabilities as hate crimes, even though half the state laws in existence

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[71] Joan Petersilia, *Persons with Developmental Disabilities in the Criminal Justice System: Victims, Defendants, and Inmates* 1 (1999b) (unpublished manuscript, on file with authors).

[72] CRIME VICTIMS, *supra* note 39, at 32-40.

[73] JENNESS & GRATTET, *supra* note 12, at 142.

[74] KAREN A. MCLAUGHLIN, KELLY BRILLIANT, & CYNTHIA LONG, U.S. DEP'T OF JUSTICE, NATIONAL BIAS CRIMES TRAINING FOR LAW ENFORCEMENT AND VICTIM ASSISTANCE PROFESSIONALS 35-41 (1995).

[75] Scott Phillips & Ryken Grattet, *Judicial Rhetoric, Meaning-making, and the Institutionalization of Hate Crime Law*, 34 L. & SOC'Y REV. 584, 584 (2000).

cover them. As a result, the special problems the disability status provision might present have not been subjected to judicial scrutiny.

The bottom line is that as both a legislative provision and practical issue, the connection between the legal and conceptual definition of "hate crime" and "disabilities" is tenuous. Disabilities provisions remain less embedded in hate crime law than do the race, religion, ethnicity, sexual orientation, and gender provisions. Yet, while people with disabilities remain less visible *as victims of hate crime* than the other minority groups (e.g., blacks, Jews, and immigrants) included in the laws, they are still more visible than other groups that have been proposed (e.g., union members, octogenarians, the elderly, children, police officers, etc.).

A comparison along these lines reveals that the inclusion of status provisions in the law is, in the first instance, an outgrowth of social movement mobilization, the presence of interest groups, and the dynamics of lawmaking. As Jenness and Grattet[76] conclude, "as with other social constructions, especially those imbued with criminal meaning, hate crime can first and foremost be seen as an outgrowth of the interplay between social movement activism, policymakers, the law (i.e., judges, police, and law enforcement), and the meanings they engender." Acknowledging the validity of this statement, it is nonetheless crucial to ask: upon what criteria *should* the selection of "target groups"[77] for inclusion in hate crime law proceed, especially if it is desirable to have the law reflect something other than mere "identity politics"?[78]

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[76] JENNESS & GRATTET *supra* note 12, at 155.

[77] Soule & Earl, *supra* note 35, at 3.

[78] Jacobs and Potter echo much of the critical commentary about hate crime laws. At the core of their criticism is a rejection of hate crime statutes for being rooted in "identity politics." In their words, "the passage of hate crime law in the 1980s and 1990s is best explained by the growing influence of identity politics in American lawmaking" JACOBS & POTTER, *supra* note 11, at 65. They argue that hate crime laws are symbolic statements requested by advocacy groups for material and symbolic reasons and provided by politicians for political reasons. Thus, from their vantage point, hate crime laws are a perfect example of legislators ceding the policymaking process to interest groups. As a result, the laws merely represent an exercise in symbolic politics. As such, they argue, hate crime policy is more likely to engender divisiveness than to ameliorate pressing problems, and are problematic as a result.

## IV. KEY CRITERIA FOR DETERMINING STATUS PROVISIONS IN HATE CRIME LAW[79]

As Laurence Tribe, constitutional law professor at Harvard University, explained to Congress, "nothing in the United States Constitution prevents the Government from penalizing with added severity those crimes directed against people or their property because of their race, color, religion, national origin, ethnicity, gender or sexual orientation, and nothing in the Constitution requires that this list be infinitely expanded."[80] Not surprisingly, then, throughout the history of social movement and legislative activity that has resulted in the enactment of the hate crime laws discussed above, there has been considerable controversy over what groups should be protected by hate crime legislation.[81]

This determination and attendant differentiation is significant. It affects the kinds of people protected, and thus the kinds of violence prosecutors can pursue as hate crimes. It also affects which minority groups are legally recognizable as victims of hate crime. More importantly, it reflects the selection of one choice over another when faced with the dilemma of difference. Specifically, to include a status provision serves—rightly or wrongly, accurately or inaccurately—to demarcate the enhanced vulnerabilities of some types of people and inscribe victim statuses on some minority groups and not others. Here, race is a proxy for non-Whites, religion is a proxy for non-Christians, sexual orientation is a proxy for gays and lesbians, gender is a proxy for girls and women, etc. In contrast, to

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[79] It should be clear that in what follows, we take up the question of what status provisions should be included in hate crime laws rather than whether or not hate crime laws are rooted in valid legal principles. The legal literature contains many assessments of the latter issue. It is interesting to note, however, that while the law review literature has been largely negative towards the laws, courts have been more receptive. We begin with the pragmatic presumption that the core principles behind hate crime laws are valid and will be treated as such for the foreseeable future. Thus, the present issue concerns what the limits of the law should be rather than whether or not the laws should exist at all. *See* George C. Thomas III, *On Trial: Laws Against Hate Crimes*, 36 CRIM. L. BULL. 3 (2000). It is also important to stress that the question is not whether or not all crimes against persons with disabilities should be converted to hate crimes. Clearly, not all crimes against Jews are hate crimes. The issue is when, where, and how hate crime enhancements should be applied to crimes against persons with disabilities.

[80] *Hate Crimes Sentencing Enhancement Act of 1992, Hearings Before the Sen. Comm. on the Judiciary*, 102d CONG. 7 (1992) (statement of Laurence Tribe).

[81] Jenness, *supra* note 58, *passim*.

forego including a status provision serves to render such social differences invisible in both the social and legal lexicon.

To determine what distinctions are to be made in the law, social scientists, legal scholars, and advocates for minority groups have identified many grounds upon which the inclusion of select status provisions can be justified, as well as many grounds upon which the exclusion of select provisions can be justified. Continuing with our focus on "disabilities," a systematic consideration of key criteria is useful for assessing the viability of orienting toward any form of group membership as an axis along which bias-motivated violence occurs and is thus legally recognized as a "hate crime."

Frederick Lawrence distinguishes bias crimes from other crimes—what he refers to as "parallel crimes"—by arguing that the former are far worse than the latter because "a bias crime occurs not because the victim is *who* he is, but rather because the victim is *what* he is."[82] With this distinction as a starting point, in his book *Punishing Hate: Bias Crime Under American Law*,[83] Lawrence addresses the question of which status characteristics should be written into hate crime law and which ones should be excluded. He proposes a "proper methodology for going about constructing such a list."[84] This methodology hinges upon moving beyond simply identifying select constituencies victimized by violence and toward an assessment of multiple factors associated with candidate constituencies, including the presence of a group identity, evidence of historical discrimination, and distinctions between types of discrimination and bias motivations. An examination of the way in which these factors contextualize crime provides a lens through which the inclusion of disabilities in hate crime law can be understood and assessed as a policy response to violence directed towards people with disabilities and the dilemma of difference more generally.

### A. PRESENCE OF A GROUP IDENTITY

Lawrence's methodology is attentive to "self-regarding groups" and not "random collections of people."[85] That is, for a

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[82] LAWRENCE, *supra* note 14, at 9.
[83] *Id.*
[84] *Id.* at 13.
[85] *Id.* at 14.

group to be recognized in hate crime law requires that some portion of society view such a collection of people as an identifiable group of persons who, to some degree, maintain a collective identity.[86] Two of the most cited scholars on the topic, sociologists Taylor and Whittier, describe a collective identity as "the shared definition of a group that derives from members' common interests, experiences, and solidarity."[87] For social psychologists and social movement scholars alike, "individuals see themselves as part of a group when some shared characteristic becomes salient and is defined as important, resulting in a sense of 'we-ness'."[88] This "we-ness," in turn, often implies opposition to other groups and/or the dominant social order.[89] To be concrete, various groups of people of color, Jews, people from other countries with non-American identities, gays and lesbians, and girls and women qualify along these lines, but blue-eyed people, people who prefer casual dress to formal dress, and people who come from one-parent families do not.

Two sources of evidence suggest that persons with disabilities comprise a "self-regarding group." First, survey data suggests that persons with disabilities do, indeed, feel a common identity with one another and see themselves as minorities in the same sense as people who are black or Hispanic.[90] Second, persons with disabilities have, over the last two decades, emerged to comprise no small sector of the modern civil rights movement. Shapiro's book, *No Pity: People with Disabilities Forging a New Civil Rights Movement*, demonstrates that people with disabilities have done so by constituting a "self-regarding group" in the form of a distinct political entity.[91] Much like people of color, gays and lesbians, and women, people with disabilities constitute an identifiable sector of a larger civil rights movement in the United States that has increasingly made demands

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[86] Verta Taylor & Nancy Whittier, *Collective Identity in Social Movement Communities: Lesbian Feminist Mobilization, in* FRONTIERS IN SOCIAL MOVEMENT THEORY 104-29 (Aldon C. Morris & Carol McClurg Mueller eds., 1992).

[87] *Id.* at 105.

[88] ALBERTO MELUCCI, NOMADS OF THE PRESENT: SOCIAL MOVEMENTS AND INDIVIDUAL NEEDS IN CONTEMPORARY SOCIETY 63-67 (1989); Taylor & Whittier, *supra* note 87, at 105; Alain Touraine, *An Introduction to the Study of Social Movements*, 52 SOC. RES. 749 (1985).

[89] MELUCCI, *supra* note 89, at 66; Taylor & Whittier, *supra* note 87, at 105.

[90] LOUIS HARRIS & ASSOC., THE ICD SURVEY OF DISABLED AMERICANS: BRINGING DISABLED AMERICANS INTO THE MAINSTREAM 7 (1986).

[91] SHAPIRO, *supra* note 56, at 111.

on the political system *as people with disabilities.* As Shapiro details:

> . . . it did not matter if disability came at birth or later, whether the person was rich or poor, or even if it did not interfere with one's accomplishments. To be disabled meant to fight someone else's reality. Other people's attitudes, not one's own disability, were the biggest barrier. This frustration gave rise to the ardor behind the disability rights movement.[92]

Representative Tony Coelho of California argued that "the strength of the disability movement came from a 'hidden army' of people who had an instinctive understanding of the stigma of being disabled."[93]

B. EVIDENCE OF HISTORICAL DISCRIMINATION

Every "self-regarding group," however, is not an equally viable contender for inclusion in hate crime law. Rather, those constituencies sharing a characteristic that implicates "classic societal fissure lines" or "divisions that run deep in the social history of a culture" are prime candidates.[94] Indeed, the dominant conception of hate crimes, evident in congressional debates,[95] popular media sources,[96] and the testimony of interest group actors,[97] is one in which the targets of hate crimes are minorities of one kind or another and who historically have been victims of racism, nativism, heterosexism, and religious persecution—blacks, Mexicans, gays and lesbians, and Jews, respectively.

In sharp contrast to the research conducted on the other categories included in hate crime laws and for which there is ample evidence of a long term pattern of discrimination and violence,[98] historians, criminologists, activists, and various state

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[92] *Id.* at 112.

[93] *Id.* at 117.

[94] LAWRENCE, *supra* note 14, at 12.

[95] Jenness, *supra* note 58, *passim.*

[96] LEVIN & MCDEVITT, *supra* note 49, *passim*; JENNESS & GRATTET, *supra* note 12, at 3.

[97] Jenness, *supra* note 58, *passim.*

[98] *See* JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY 51-52 (1980); JACOBS & POTTER, *supra* note 11, at 391; JONATHAN N. KATZ, GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A. 16-120 (1976); NEIL K. KRESSEL, MASS HATE: THE GLOBAL RISE OF GENOCIDE AND TERROR 2-8 (1996); MICHAEL NEWTON & JUDY ANN NEWTON, RACIAL AND RELIGIOUS VIOLENCE IN AMERICA: A CHRONOLOGY *passim* (1991); Carole J. Sheffield, *Hate Violence, in* RACE, CLASS AND GENDER IN THE UNITED STATES 388 (Paula Rothenberg, ed., 1992); Gad Bensinger, *Hate Crimes: A New/Old Problem,* 16 INT'L J. COMP. & APPLIED CRIM. JUST. 115 (1992); Maroney, *supra* note 18,

agencies have only recently begun to document the influence of disabilities as a predisposing factor in discriminatory violence. Although most violence against persons with disabilities is hidden from view, researchers have begun to document a variety of forms of violence directed towards persons with disabilities, from symbolic to fatal assaults involving a range of perpetrators, and from intimates to strangers to institutions such as the state and medicine.[99] This includes "assisted suicides" of severely disabled people, parental participation in the starvation of disabled newborns in hospitals, sexual abuse in the isolation of the nuclear family, routine physical abuse in institutional settings, and an array of medical practices legitimized as necessary, such as electro-convulsive therapy, psychosurgery, eugenic sterilization, medical experimentation, and extensive medicating and adverse behavioral modification.[100] It also includes seemingly "random violence"[101] in the public sphere.

With the passage of the Americans with Disabilities Act[102] in 1990, the United States government recognized "that disabled persons have been "subjected to a history of purposeful unequal treatment."[103] Harlan Hahn's work suggests that, at least in part, this unequal treatment resulted because both historically and in the current era, people with disabilities have been positioned as inferior, thereby leading to centuries of systematic discrimination.[104] In perhaps the most cited work on the topic, Dick Sobsey points to the cultural *exosystem*—the cultural and social beliefs about disability—that has contributed to the differential treatment of people with disabilities, as well as patterned and predictable violence against those with disabilities for centu-

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at 564. *See generally* Jane Caputi, *To Acknowledge and to Heal: 20 Years of Feminist Thought and Activism on Sexual Violence, in* THE KNOWLEDGE EXPLOSION: GENERATIONS OF FEMINIST SCHOLARSHIP 340 (Cheris Kramarae & Dale Spender eds., 1992) (reviewing feminist activism on sexual violence in the U.S. and abroad).

[99] CRIME VICTIMS, *supra* note 39, at 20.

[100] Harlan Hahn, *Civil Rights for Disabled Americans: The Foundation of a Political Agenda, in* IMAGES OF THE DISABLED, DISABLING IMAGES 181-85 (Alan Gartner & Tom Joe eds., 1987); Waxman, *supra* note 45, at 185.

[101] *See generally* JOEL BEST, RANDOM VIOLENCE: HOW WE TALK ABOUT NEW CRIMES AND NEW VICTIMS (1999) (examining the social construction and public perception of violence in the U.S., especially seemingly unpredictable violence).

[102] 42 U.S.C. § 12101 (1990).

[103] *See id.* § 12101(2)(7).

[104] Hahn, *supra* note 101, at 184.

ries.[105] With regard to the latter, Petersilia's recent work corroborates this view. She found that people with developmental disabilities are four to ten times more likely to be crime victims than people without a disability.[106] Moreover, children with any kind of disability are more than twice as likely as nondisabled children to be physically abused and almost twice as likely to be sexually abused.[107] Consistent with these findings, Waxman observed that "disabled people face a pattern of oppressive societal treatment and hatred, much as women face misogeny [sic], gay men and lesbians face homophobia, Jews face antisemitism, and people of color face racism."[108]

Taken together, this research suggests that the visibility of violence against persons with disabilities is where the visibility of violence directed at people of color, girls and women, and gays and lesbians was not so long ago. That is, what was once invisible is becoming increasingly recognized. Private pain and violence are increasingly being perceived as public problems, requiring governmental response. Moreover, violence is being increasingly seen as not merely epiphenomenal to the subordination of persons with disabilities, but as central to its maintenance.[109]

### C. DISTINGUISHING BETWEEN TYPES OF DISCRIMINATION AND BIAS MOTIVATIONS

To simply document how different groups—racial, religious, and ethnic minorities, as well as gays and lesbians, women, and people with disabilities—are differentially vulnerable to crime does not, in and of itself, constitute prima facie evidence of hate crime. To further demarcate how bias crimes are different from parallel crimes, Berk, Boyd, and Hamner make a useful distinction between actuarial and symbolic crimes. In their words:

> Perhaps the best place to begin is with the broad observation by Grimshaw (1969b), Sterba (1969), and Nieburg (1972) that one key ingredient in hate-motivated violence is the 'symbolic status' of the victim.

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[105] DICK SOBSEY, VIOLENCE AND ABUSE IN THE LIVES OF PEOPLE WITH DISABILITIES: THE END OF SILENT ACCEPTANCE? 13-17 (1994).

[106] Petersilia, *supra* note 72, at 3.

[107] *Id.*

[108] Waxman, *supra* note 45, at 187.

[109] CRIME VICTIMS, *supra* note 39, at 10-20.

> Thus Grimshaw (1969b, p. 254) speaks of violence as 'social' when 'it is directed against an individual or his property solely or primarily because of his membership in a social category.' A social category is defined by one or more attributes that a set of individuals share, which have implications for how the individuals are perceived or treated.[110]

Accordingly, *symbolic crimes* are best envisioned as social crimes because the victims are selected precisely because of what they symbolize. The crime is committed for expressive reasons. The most vivid historical example of this is perhaps the lynching of blacks where the corpses were then displayed in communities to send a message to other blacks and whites who sympathized with the plight of the blacks.[111] A more recent example is the incident that occurred in Laramie, Wyoming, where Matthew Shepard, a young gay man, was robbed, pistol-whipped, tied to a fence, and left to die by two young men who were offended by his homosexuality.[112] In each case, the individual had been victimized in order to convey a message to the larger community. As Representative Conyers explained when trying to convince his fellow legislators of the importance of hate crime legislation,

> Hate crimes, which can range from threats and vandalism to arson, assault, and murder, are intended to not just harm the victim, but to send a message of intimidation to an entire community of people. [Because of this added element] Hate crimes are extraordinary in nature and require a special government response.[113]

In contrast to symbolic crimes, *actuarial crimes* involve the selection of a victim based on his/her real or imagined social characteristic(s), but not for expressive or symbolic reasons. Rather, actuarial crimes are done for instrumental reasons. As Berk, Boyd, and Hamner explain, "people routinely make lay estimates of central tendencies associated with particular social categories."[114] These assessments play into all sorts of choices criminals make prior to engaging in criminal conduct. For example, a group of perpetrators may purposely assault and rob a gay man not because of what his sexual orientation represents

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[110] Berk et al., *supra* note 19, at 127.

[111] THE KU KLUX KLAN: A HISTORY OF RACISM AND VIOLENCE 16 (Sara Bullard, ed. 1991).

[112] Joshua Hammer, *The 'Gay Panic' Defense: Accused Says He Killed Matthew Shepard in a Rage Triggered by Memories of a Childhood Assault*, NEWSWEEK, Nov. 8, 1999, at 40.

[113] 134 CONG. REC. 11393 (daily ed. May 18, 1988) (statement of Rep. Conyers).

[114] Berk et al., *supra* note 19, at 128.

to them, but because they apply a stereotype to him that is anchored in the notion that gay men are effeminate and thus less inclined to resist assault. Alternatively, a group of perpetrators may purposely assault and rob a Jewish man not because of what Jewishness represents to them, but because they apply a stereotype to him that is anchored in the notion that Jews have more money than gentiles, thus they are more likely to "pay-off" than random victims of assault and robbery. In a similar fashion, a group of perpetrators may purposely assault and rob a person in a wheelchair not because of their antipathy toward persons with disabilities, but because they apply a stereotype to him that is anchored in the notion that persons with disabilities are less inclined to resist, unable to seek assistance, unlikely to evoke the attention of authorities, and/or unable to testify about victimization when authorities are attentive. In each of these examples, the victim's symbolic status is used to retrieve relevant "factual" information about him/her as a *likely* crime victim, not as a member of a social category held in ill-repute. In other words, it is this factual information, mediated through some imagined actuarial table, that motivates the crime, not bigotry. "This distinction between symbolic and actuarial crimes suggests a potentially useful boundary between hate-motivated crimes and other offenses,"[115] even though in many cases making clear empirical distinctions can be difficult. Nonetheless, Berk, Boyd, and Hamner conclude that "perhaps the essential feature of hate-motivated crimes is their symbolic content. Crimes motivated solely by the victim's actuarial status would seem best included in another category."[116]

Related to the distinction between symbolic and actuarial crimes, a distinction can be made between "two analytically distinct, but somewhat overlapping [statutory] models of bias crimes"[117]: the discriminatory selection model and the racial animus model. Each of these models assumes the presence of discrimination in the selection of crime victims. Each model, however, posits different criteria for assessing what does and does not equal bias or hate crime. Accordingly, each model is relevant to the consideration of persons with disabilities as victims of hate crime.

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[115] *Id.*

[116] *Id.* at 131.

[117] LAWRENCE, *supra* note 14, at 29-30.

The *discriminatory selection model* defines hate crime solely on the basis of the perpetrator's discriminatory selection of a victim, regardless of why such a selection was made. For example, like girls and women, people with disabilities may be targeted simply because they are perceived to be more vulnerable victims. Consistent with the development of sexual harassment law,[118] the reasons or motivations for the discrimination—in this case, differential selection—are irrelevant to the applicability of the law. As the Court of Appeals of Florida has stated in regard to Florida's hate crime law,

> [I]t does not matter why a woman is treated differently than a man, a black differently than a white, a Catholic differently than a Jew; it matters only that they are. So also with section 775.085 [Florida's hate crime statute]. It doesn't matter that Dobbins hated Jewish people or why he hated them; it only mattered that he discriminated against Daly by beating him because he was Jewish.[119]

With this view, victim selection based upon vulnerability would be punished the same as a situation where a victim was selected to express hatred. In other words, the discriminatory selection model does not distinguish between symbolic and actuarial crimes. It is inclusive of both kinds. It is also the most popular form of the law, with roughly two-thirds of the state laws and the existing and proposed federal laws based upon it.[120] Finally, this form of the law was legitimated in 1993 in *Wisconsin v. Mitchell*,[121] the first case in which the Supreme Court expressly sustained a modern bias crime law.[122]

In sharp contrast, the *racial animus model* focuses attention on the reason for the discriminatory selection of victims. This approach assumes that the motivation for the selection of a victim is less instrumental and more expressive; perpetrators use the act of victimization to express animus toward the category of persons the victim represents (i.e., a person of color, a homosexual, a Jew, a disabled person, etc.). As such, the racial animus model follows the distinction between actuarial and symbolic crimes by defining the former as beyond the domain

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[118] Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1687 (1998).

[119] Dobbins v. State, 605 So. 2d (Fla. Ct. App. 1992).

[120] JENNESS & GRATTET, *supra* note 12, at 87.

[121] Wisconsin v Mitchell, 508 U.S. 476 (1993).

[122] LAWRENCE, *supra* note 14, at 30-34; Phillips & Grattet, *supra* note 76, at 584.

of the law and the latter within the desirable domain of hate crime law. As Lawrence explains,

> This model is consonant with the classical understanding of prejudice as involving more than differential treatment on the basis of the victim's race. This understanding of prejudice, as reflected in the racial animus model of bias crimes, requires that the offender have committed the crime with some measure of hostility toward the victim's racial group and/or toward the victim because he is part of that group.[123]

Interestingly, this model of bias crime is evident in the regulations promulgated by the FBI to implement the Hate Crimes Statistics Act.[124] These regulations define bias crime conduct as that which is motivated, in whole or in part, by a "preformed negative opinion or attitude toward a group of persons based on their race, religion, ethnicity/national origin, or sexual orientation."[125]

By definition, all cases falling under the rubric of the racial animus model are also cases that fall under the rubric of the discriminatory selection model, but not vice-versa. Thus, the racial animus model implies a more stringent approach to hate crime than does the discriminatory selection. From Lawrence's legally and politically strategic point of view, the discriminatory selection errs on the side of over-inclusion. He argues that a focus on the racial animus model is preferable precisely because of the type bigotry it implicates and the harm it encapsulates. With regard to the latter, Lawrence argues that "bias crimes ought to receive punishment that is more severe than that imposed on parallel crimes" because "they cause greater harm than parallel crimes to the immediate victim of the crime, the target community of the crime, and the general society."[126] This argument draws on an array of ideas from theories of punishment to posit that there are two elements of a crime that describe its seriousness: culpability of the offender and harm caused by society.[127]

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[123] LAWRENCE, *supra* note 14, at 34.

[124] Hate Crimes Statistics Act of 1990, Pub. L. No. 101-275 (1990).

[125] Model Penal Code §§ 2.06, 5.02 (1985).

[126] LAWRENCE, *supra* note 14, at 34, 44.

[127] In a lengthy discussion in a chapter devoted to addressing the question "Why are Bias Crimes Worse?," Lawrence argues that "the culpability associated with bias crimes makes these crimes more severe than parallel crimes" and that "a harm-based analysis demonstrates that bias crimes are more serious than parallel crimes."

Compared to the discriminatory selection model, however, the racial animus model has had a considerably more difficult time marshaling appellate court approval. The United States Supreme Court[128] and the supreme courts of Washington and New Jersey[129] have struck down laws, in whole or in part, because they relied on phrasing that went beyond mere bias intent. In addition, in *State v. Stadler*[130] the Florida Supreme Court stated that its law, which required "evidence of prejudice," should be interpreted as a discriminatory selection law, regardless of the specific wording of the statute. Thus, while the animus model is desirable insofar as it targets bigotry directly, its weaker jurisprudential foundation in antidiscrimination principles renders it more vulnerable to constitutional challenges.

Both the discriminatory selection model and the racial animus model can be applied to the case of violence against persons with disabilities. With regard to the latter model, some evidence suggests that persons with disabilities face higher rates of victimization not because perpetrators harbor ill-will toward those with disabilities, but because people with disabilities are in vulnerable situations. According to the Office for Victims of Crime:

> Another reality is that many offenders are motivated by a desire to obtain control over the victim and measure their potential prey for vulnerabilities. Many people with disabilities, because they are perceived as unable to physically defend themselves, or identify the attacker, or call for help, are perfect targets for such offenders. Just as many pedophiles gravitate to youth serving occupations, so do many other predators seek work as caregivers to people with disabilities. Indeed, in one survey, virtually half—48.1 percent—of the perpetrators of sexual abuse against persons with disabilities had gained access to their victims through disability services.[131]

It is difficult to grant credibility to any claims about the precise motivational nature of such crimes since there is so little systematic evidence on the subject. Assuming, however, for the moment that this is an accurate empirical portrayal of such crimes, the type of bias crime persons with disabilities face can

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LAWRENCE, *supra* note 14, at 60-61. Therefore, he concludes, enhanced penalties for bias-motivated crimes are appropriate.

[128] R.A.V. v. St. Paul, 505 U.S. 377 (1992).

[129] State v. Talley, 122 Wash. 2d 192 (1993); State v. Kearns, 136 N.J. 56 (1994).

[130] State v. Stalder, 630 So. 2d 1072 (Florida S. Ct. 1994).

[131] CHERYL GUIDRY TYISKA, U.S. DEP'T OF JUSTICE, WORKING WITH VICTIMS OF CRIME WITH DISABILITIES 4 (1998).

be thus characterized as discriminatory, but not animus-motivated.

At the same time, however, violence directed toward people with disabilities can be characterized as motivated by animus. Katz and his colleagues' work,[132] for example, suggest that non-disabled people have a tendency to dislike those who arouse fear or guilt in them (i.e., people with disabilities), and perceive people with disabilities as inferior and responsible for their own fate. They are, in essence, "deserving victims." Similarly, Hahn's work suggests that violence directed toward those with disabilities is an outgrowth of fear best characterized by *existential anxiety*—the fear of others whose visible traits are perceived as disturbing or unpleasant—which gets expressed as hatred toward people with disabilities.[133] Consistently, Shapiro's book provides ample evidence that persons with disabilities have historically been despised and stigmatized by those without disabilities. This has resulted in the latter denigrating, segregating, and, on occasion, outright attacking the former.[134] As Waxman concluded, "the contention that vulnerability is the primary explanation for disability-related violence is too superficial. Rather, hatred is the primary cause, and vulnerability only provides an opportunity for offenders to express their hatred. Indeed, people who are respected and considered equal are not generally abused."[135] Supporting this view, Longmore and Bouvia describe disability-related violence as a reflection of growing hostility toward those who require and increasingly demand alternative physical and social arrangements to accommodate them.[136]

In the end, these various ways of envisioning the parameters of motivation or bias-intent may prove to be a difference without distinction. Jenness and Grattet's work on hate crime as a "policy domain"[137] suggests that since the invention of the term

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[132] IRWIN KATZ, STIGMA: A SOCIAL PSYCHOLOGICAL ANALYSIS, 16-21 (1981); Irwin Katz et al., *Ambivalence, Guilt, and the Denigration of a Physically Handicapped Victim*, 45(3) J. PERSONALITY 419 (1977).

[133] Hahn, *supra* note 101, at 181.

[134] Waxman, *supra* note 45, at 185.

[135] *Id.* at 191.

[136] Paul Longmore & Elizabeth Bouvia, *Assisted Suicide and Social Prejudice Issues*, 3 LAW & MED. 141 (1987).

[137] Borrowing from Burstein, Jenness and Grattet use the term policy domain to denote "components of the political system organized around substantive issues."

"hate crime" in the late 1970s, lawmakers and judges have increasingly agreed that the parameters of the discriminatory selection model provide the most legitimate foundation for modern hate crime law. Early in the history of hate crime law, lawmakers experimented with four distinct ways of phrasing the intent standard as they grappled with how to write hate crime law. However, as Figure 2 reveals, by 1990 two forms of motivational phrasing—the "because of" wording and "intent to harass or intimidate" wording—began to emerge as the most popular. Finally, after 1993, the "because of" phrasing became the dominant form, with roughly half of the adopting states using such language. Thus, the emergent legitimate form of the law does not distinguish between mere bias-intent and hatred. Similarly, appellate court decisions on hate crime cases have, over time, increasingly endorsed the "because of" phrasing in hate crime law. In so doing, courts have maintained that it does not matter what political views or ideologies motivated the act. Rather, all that matters is that a victim was selected "because of" their race, religion, ancestry, etc., quite apart from the degree of malice involved on the part of the perpetrator.[138] This "causation" has caused some to shift from using the term "hate" crime to the term "bias" crime. Presumably, the same logic would apply to violence directed at persons with disabilities. These trends in lawmaking and judicial decision-making suggest that the least stringent form of motivational phrasing, which maps onto the discriminatory selection model, is increasingly dominant.

Having articulated a set of criteria by which "disabilities" could be considered a candidate for inclusion in state and federal hate crime law, it is now appropriate to return to a consideration of what this end result would mean for the "dilemma of difference." Accordingly, in the conclusion that follows, the applicability of "disabilities" to hate crime law is examined in light of its consequences for particularly conceiving of persons with disabilities and generally conceiving of minority groups as both different from and the same as "others."

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Paul Burstein, *Policy Domains: Organization, Culture, and Policy Outcomes*, 17 ANN. REV. SOC. 327, 327 (1991); JENNESS & GRATTET, *supra* note 12, at 6.

[138] Phillips & Grattet, *supra* note 76, at 584-85.

FIGURE 2

| | "because of" | "intent to intimidate or harass" | "maliciously and with specific intent to harass" | "prejudice, hostility, maliciousness" |
|---|---|---|---|---|
| 80 | | | | |
| 81 | | 1 | 1 | |
| 82 | 2 | 3 | 1 | 1 |
| 83 | 2 | 4 | 2 | 1 |
| 84 | 3 | 4 | 2 | 1 |
| 85 | 3 | 4 | 2 | 1 |
| 86 | 4 | 4 | 2 | 1 |
| 87 | 5 | 6 | 3 | 1 |
| 88 | 8 | 7 | 4 | 1 |
| 89 | 11 | 10 | 4 | 3 |
| 90 | 11 | 11 | 5 | 4 |
| 91 | 12 | 11 | 5 | 4 |
| 92 | 12 | 12 | 5 | 4 |
| 93 | 12 | 12 | 6 | 5 |
| 94 | 15 | 12 | 6 | 5 |
| 95 | 17 | 12 | 6 | 5 |
| 96 | 17 | 12 | 6 | 5 |
| 97 | 19 | 12 | 6 | 5 |
| 98 | 20 | 12 | 6 | 6 |
| 99 | 20 | 12 | 6 | 6 |

## V. HATE CRIME LAW, DILEMMA OF DIFFERENCE, AND IMPLICATIONS

This article describes the general framework and principles underlying an evolving body of hate crime law, indicating how disabilities, as a status provision, might "fit" within its basic parameters. The consistency of disabilities within the hate crime law framework, however, does not directly address the desirability of including or emphasizing it—or any other provision, for that matter—from the standpoint of the dilemma of difference. As suggested at the outset of this article, the dilemma of difference encourages consideration of the practical and political significance of public policies built around the goal of increasing inclusion for particular minority groups. The dilemma is whether those policies should treat a minority group the same as other groups in society or whether the policies should offer them special treatment. As Minow succinctly explained, "the di-

lemma of difference may be posed as a choice between integration and separation, as a choice between similar treatment and special treatment, or as a choice between neutrality and accommodation."[139]

The dilemma of difference and alternative resolutions to the dilemma of difference are manifest in contemporary policies that surround persons with disabilities in particular, as well as in hate crime law more generally. For example, the former manifestation is most evident in some of the alternatives offered during the Department of Justice's 1998 *Symposium on Working with Crime Victims with Disabilities.*[140] The policy proposals contained in this position statement are divided into three general areas: physical accessibility, networking and training, and direct services. Changes in each of these areas can be undertaken with the dilemma of difference in mind. For example, increases in accessibility can be accomplished according to so-called "universal design" principles, where the idea is to construct environments and communication tools usable "to the greatest extent possible by the broadest number of users including children, older adults, people with disabilities, people of atypical size or shape, people who are ill or injured, and people inconvenienced by circumstances."[141] Such an approach would allow for the inclusion of people with disabilities without distinguishing them as "special." Likewise, proposals regarding law enforcement training encourage fostering a recognition of and responsiveness to persons with disabilities as potential and actual victims of crime. Here, the content of the educational message is crucial. Officials must be made to move beyond their assumptions about persons with disabilities as pitiable and, instead, emphasize that accommodating and including persons with disabilities is, in fact, a matter of entitlement, not charity. Educational efforts therefore need to simultaneously encourage officials to recognize that crimes against persons with disabilities regularly happen and challenge the initial assumptions those officials might have about persons with disabilities.

The point of implementing these types of changes is to increase recognition and accessibility without engendering subor-

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[139] MINOW, *supra* note 5, at 20-21.

[140] TYISKA, *supra* note 41 *passim.*

[141] CENTER FOR UNIVERSAL DESIGN, PRINCIPLES OF UNIVERSAL DESIGN (1999), *at* http://www.design.ncsu.edu/cud/.

dination and further segregation. Ideally, changes should not emanate from a sense of pity, nor should they reflect the inferiority or dependence of persons with disabilities. Moreover, "special treatment," as it were, should not be a mandated practice, but rather an extra opportunity. Ironically, these examples—the proposals regarding accessibility and law enforcement training reform—achieve a resolution to the dilemma of difference in opposite ways. Universal design principles do not create "special" treatment, but instead work to broaden the sense of "normal" treatment. In contrast, the training programs involve "special" attention to the needs of persons with disabilities, the success of which is dependent upon constantly working to erode officials' assumptions about persons with disabilities as less capable and credible participants in the criminal justice process. Thus, although it reinforces the special character of disabilities, it would remove the stigma of difference and make difference "costless."

Hate crime laws, too, create a novel way of orienting the dilemma of difference, as it relates to "disabilities," as a policy provision and "persons with disabilities" as a target population. As detailed throughout this article, hate crime law is, first and foremost, about delineating axes of discrimination that demarcate groups in need of increased attention and responsiveness by the criminal justice system. This delineation is legitimated in light of its differential vulnerabilities to violence. In simple terms, hate crime law is a recent, innovative, and distinct policy option available to, arguably, enhance the status and welfare of persons with disabilities.

Hate crime laws treat persons with disabilities as *both* "different from" and "the same as" other persons. They do so by simultaneously segregating *and* integrating persons with disabilities from/into the criminal justice system. As we show below, envisioning crimes against persons with disabilities as a "hate crime" entails affording "special" treatment to those with disabilities. At the same time, it requires treating persons with disabilities the "same" as other minority groups and other individuals victimized by violence because of membership in a socially recognizable group.

With regard to different treatment and segregated practices, including "persons with disabilities" in the formulation of "hate crime" elevates some crimes committed against persons with disabilities to a unique category of criminal conduct. This

criminal category—hate crime—evokes unique policing practices,[142] special prosecutorial concerns,[143] and harsher penalties.[144] When applied to persons with disabilities, hate crime law bestows minority status upon fifty-four million people who comprise the disabled population in the United States.[145] Thus, hate crime law has the potential to distinguish persons with disabilities from the rest of the population of potential crime victims.

With regard to same treatment and integrating practices, the institutionalization of disabilities provisions in hate crime law serves to include persons with disabilities into the coalition of status groups already covered under the law, ensuring there is nothing "special" or "different" about persons with disabilities. That is, "persons with disabilities" are extended the "same" treatment afforded to other similarly situated groups, in this case other "target groups" that evidence the presence of a group identity, historical discrimination, and bias-motivated violence directed toward them. In addition, all of the target groups in hate crime law are afforded the same treatment as any other potential crime victim because hate crime laws—like the other anti-discrimination laws that preceded them—are written in a way that elides the historical basis and meaning of hate crime. Hate crime laws elide by translating specific categories of persons—blacks, Jews, gay and lesbians, immigrants, and women, for example—into all-encompassing and seemingly neutral categories (e.g., race, religion, sexual orientation, national origin). In doing so, the laws do not offer any remedies or protections to these groups that are not simultaneously available to all other races, religions, genders, sexual orientations, nationalities, etc.[146] Indeed, members of "majority groups" can and have used hate crime law on their behalf.[147]

It is important to emphasize, however, that the history and content of violence organized around axes of (dis)ability are not equivalent to other forms of discriminatory violence, such as

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[142] Chuck Wexler & Gary T. Marx, *When Law and Order Works: Boston's Innovative Approach to the Problem of Racial Violence*, 32 CRIME & DELINQUENCY 205, 205 (1986); Martin, *supra* note 32, at 305; Berk et al., *supra* note 19, at 133; JENNESS & GRATTET, *supra* note 12, at 138.

[143] JENNESS & GRATTET, *supra* note 12, at 147-51.

[144] *Id.* at 148.

[145] MCNEIL, *supra* note 37, at 1.

[146] *See* JENNESS & GRATTET, *supra* note 12, at 179.

[147] Wisconsin v. Mitchell, 508 U.S. 476 (1993).

those organized around race or religion. But, anti-gay/lesbian violence is not equivalent to racial or religious-based violence either; nor is violence organized around gender equivalent to violence organized around race, ethnicity, sexuality, etc. Emerging within the context of an American legal tradition that embraces a "sameness" principle, hate crime law does not possess the nuance to treat these different manifestations of intergroup conflict differently. Indeed, sameness in the context of hate crime has meant that laws have been written in a way that equates a hate crime against a black person with one against a white person, thus promoting "within category" sameness. Similarly, hate crimes against persons with disabilities are rendered equivalent to hate crimes against Muslims, thus inscribing "across category" sameness.

At the end of the day, all target groups are treated the same and all sides of demonstrable axes of social inequality and the criminal victimization that informs, maintains, and reflects it are treated the same. Although hate crime law can, at a glance, appear to identify, demarcate, and promote attentiveness to social differences, the way it is written and enforced promotes sameness and overrides differences. Thus, it is possible that hate crime law manages to increase public awareness of criminal victimization of persons with disabilities without defining them as "special."